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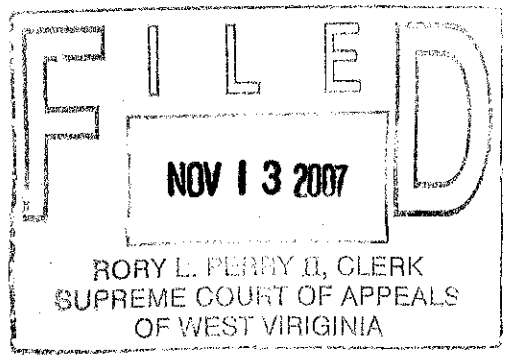
BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 33522



STATE OF WEST VIRGINIA,

v.

WANDA CARNEY,

Defendant.

CONVICTED IN A JOINT TRIAL WITH:

STATE OF WEST VIRGINIA,

v.

BETTY JARVIS,

Defendant.

JOINT APPEAL FROM THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

DEFENDANTS' JOINT APPEAL BRIEF

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I.

Kind of proceeding and nature of rulings below

TO THE HONORABLE JUSTICES OF THE

WEST VIRGINIA SUPREME COURT OF APPEALS:

In this case, the State alleged that making derogatory comments about some police officers, providing temporary shelter outside of Mingo County for a witness, who feared for her life, and conducting a very brief search of a house, that had neither been sealed off by the police nor been

the scene of any crime, and **with the permission of the house's owner, who was present at the time,** somehow constituted obstructing a police officer, in violation of W.Va.Code §61-5-17(a).

The State claimed the derogatory allegations regarding the police caused certain witnesses to lose their trust in the police, which "hindered" the officers, who had to convince the witnesses that the police could be trusted. The State further claimed to be horribly inconvenienced and hindered by Defendants assisting a witness, who was scheduled to be interviewed by the police the next day, to escape the threats from the Mingo County drug community by giving her temporary shelter outside of Mingo County. The State also theorized that any items removed from the house, which were provided to law enforcement authorities within days after the search and which included a Bible, a paper on witchcraft, and some empty film canisters, may have provided relevant evidence in the case, but now was tarnished by this search. Although the officers who testified in this trial acknowledged the State never had probable cause to search this particular house and, therefore, never would have had access to anything in this house and other persons removed unknown materials from this same house a few days earlier, but were never charged with anything, nevertheless, the State contended Defendants' actions hindered their investigation.

On September 8, 2006, after accepting the State's theory, a jury in the Circuit Court of Mingo County, with the Honorable Judge Michael Thornsbury presiding, found Defendants Wanda Carney and Betty Jarvis each guilty of one count of obstructing a police officer and one count of conspiracy to obstruct a police officer.[1]

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[1]Initially, Defendants were arrested in August, 2005, for burglary and petit larceny, based upon the consented to search of a house. However, by the time the grand jury issued the indictments against Defendants, the burglary and petit larceny charges were omitted and replaced by the State's novel theory regarding obstructing a police officer and conspiracy to obstruct a police officer.

The trial court sentenced both Defendants to one year for obstructing and one year for conspiracy, with the sentences to be served concurrently. Defendants' requests for probation or alternative sentencing were granted, the sentences were suspended, and the trial court placed each Defendant on 120 days of electronic home confinement, required each Defendant to complete 200 hours of community service, and required each Defendant to enroll and complete a higher education class in criminal justice/procedure. Fines and costs also were assessed.

The criminal convictions in this case represent an **unprecedented** and improper expansion of the crime of obstruction of a police officer. Defendants never took **any forcible or illegal action directly against a police officer**, which is required for a conviction under W.Va.Code §61-5-17(a). This Court has never decided an obstruction of a police officer case where there was no direct forcible or illegal action taken by the defendant against a police officer. In the present case, the criminal actions complained about by the State either were conversations Defendants allegedly had with people other than police officers and outside the presence of any police officer and Defendant Jarvis going inside a house, with the permission of the house's owner, while Defendant Carney remained in a car outside this house.

Even worse, if these convictions are permitted to stand, the State has criminalized constitutional conduct. These Defendants had the right, under the First Amendment, to express their opinions regarding the police when speaking to witnesses and to explore the various rumors of police misconduct that were floating around Mingo County long before these Defendants were involved. Furthermore, since both Defendants were assisting in investigating criminal allegations asserted against a criminal defendant, the Sixth Amendment rights of all criminal defendants are implicated if their investigators and people assisting in the investigation can be subjected to criminal charges merely for talking to witnesses, gathering evidence, and offering protection and shelter for a witness.

Before trial, Defendants filed motions to dismiss the indictment and after trial filed motions for judgments of acquittal. (July 20, 2006 Tr. 3-88; September 8, 2006 Tr. 134). The trial court denied all of these motions, which were reargued in the post-trial motions, in an order entered October 23, 2006, and sentenced Defendants in an order entered October 26, 2006. In an order entered February 23, 2007, the appeal time was extended to March 27, 2007. Defendants file this appeal from these final orders.

II.

Statement of facts

A.

Investigation into the murder of Carla Collins

To understand the allegations in the present case, some background into the underlying criminal investigation is needed. In 2004 and 2005, various law enforcement agencies were investigating the illegal sale of drugs in Mingo County.[2] In connection with this investigation, a person named Carla Collins introduced the police to George "Porgie" Lecco, who owned a Pizza Plus restaurant in Mingo County. (September 8, 2006 Tr. 5, 81).[3] In February, 2005, the police conducted a raid on Mr. Lecco's Pizza Plus restaurant and recovered drugs and money, but did not place Mr.

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[2]Several witnesses in this case made mistakes when referring to the particular year that an event occurred. The transcript is riddled with statements referring to 2004, when the witness more accurately should have said 2005. In this **APPEAL BRIEF**, rather than repeat these erroneous dates verbatim, counsel has attempted to provide the Court with the accurate dates, based upon both the transcript as well as other documents.

[3]The pages in the hearing and trial transcripts begin with page one on each separate day, rather than being numbered consecutively and cumulatively from the first hearing to the last hearing. Therefore, in citing to the record, it is necessary to cite both the date of the hearing or trial and the page number.

Lecco under arrest at that time. (September 8, 2006 Tr. 52, 80). Following the raid, Mr. Lecco participated in several controlled drug buys. (September 7, 2006 Tr. 53).

In mid-April, 2005, Ms. Collins was reported by her mother as missing. The body of Ms. Collins was found about two months later. (September 7, 2006 Tr. 6). Through the subsequent investigation into her death, the police determined that Ms. Collins had been murdered on April 16, 2005. (September 7, 2006 Tr. 28). Initially, all criminal charges arising out of this murder were filed in state court. However, all of the state court criminal charges, except for the charges against these two Defendants, eventually were dismissed and the following people were charged with various crimes in federal court–George "Porgie" Lecco, Valerie Friend, Patricia Burton, Walter Harmon, Charles Burton, and Jake Hatfield. (September 7, 2006 Tr. 8). Three people were present at the murder of Ms. Collins--Patricia Burton, Valerie Friend, and Carmella Blankenship.[4] (September 7, 2006 Tr. 101). Thus, the only remaining **State** charges to be prosecuted were the obstructing a police officer charges filed against Defendants Carney and Jarvis. (September 7, 2006 Tr. 34).

Defendant Carney was employed as an investigator by criminal defense lawyer Michael T. Clifford. Mr. Clifford represented a person named Walter Harmon, who, along with several other people, initially was facing a charge of first degree murder in the Circuit Court of Mingo County for the murder of Carla Collins. Defendant Jarvis, who is one of Mr. Harmon's aunts and who originally is from Mingo County, was friends with Defendant Carney and Mr. Clifford, and sought to assist them in connection with the defense of her nephew.

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[4]In the transcript, Carmella Blankenship sometimes is referred to as "Carmella Kinder."

B.

Unsubstantiated rumors regarding police misconduct preceded Defendants' involvement in this case

Once Ms. Collins' body was found, Mingo County was rife with rumors over what had happened to her and who was involved in her murder. People were alleging the police were engaged in a cover-up, certain police officers had been sexually intimate with Ms. Collins, Ms. Collins was pregnant at the time of her death, and some police officers were assisting Mr. Lecco continue his drug trade after the raid on Pizza Plus.

The State did not present any evidence that any of these rumors was started by Defendants Carney or Jarvis. In fact, the evidence demonstrated these rumors were circulating in Mingo County **prior** to any involvement by these Defendants. State Trooper Clifford Akers testified that even before Mr. Harmon was arrested, whose arrest triggered the involvement of these Defendants assisting in the investigation, there already were rumors of sexual impropriety between officers and witnesses, and he testified that one rumor regarding sexual impropriety with the police was started by Carla Collins herself. State Trooper Akers admitted that Defendants Carney and Jarvis did not start these rumors. (September 8, 2006 Tr. 90). There also were rumors of the police covering up or taking care of Mr. Lecco prior to the arrest of Mr. Harmon. (September 8, 2006 Tr. 90). State Trooper David Nelson testified that after Mr. Lecco began cooperating with the police, the police had heard that he was still engaging in drug trafficking in Mingo County. (September 7, 2006 Tr. 39).

C.

Defendants' involvement in investigating facts to assist in the defense of criminal charges filed against Walter Harmon

In June, 2005, Defendant Carney began working as an investigator for Mr. Clifford's client, Walter Harmon. (September 8, 2006 Tr. 149). Mr. Clifford later also represented Charles Jake

Hatfield and Defendant Carney investigated on his behalf as well. (September 8, 2006 Tr. 150). Neither Mr. Clifford nor Defendant Carney ever did any work for Mr. Lecco. (September 8, 2006 Tr. 150).

On the day Mr. Harmon's father came to the office to retain Mr. Clifford, Defendant Carney went to Mingo County and spoke to Carmella Blankenship and Valerie Friend. These witnesses told Defendant Carney that Mr. Harmon was not present at the murder scene. As a result of the development of this exculpatory evidence, the murder charges against Mr. Harmon subsequently were dismissed. (September 8, 2006 Tr. 151).

During the time she investigated, Defendant Carney interviewed from fifty to seventy people in Mingo County. (September 8, 2006 Tr. 151). In the course of doing these interviews, Defendant Carney was given two consistent leads that she felt obligated to pursue–drugs were abused at a high level in the Red Jacket/Newton area and the police were in on the drug trade. (September 8, 2006 Tr. 152). Defendant Carney was told from several different sources that State Trooper Nelson had had a sexual relationship with Carla Collins. (September 8, 2006 Tr. 153). Defendant Carney felt she had an obligation to investigate these rumors of police misconduct in connection with the work she was performing on behalf of Mr. Clifford's clients. (September 8, 2006 Tr. 153).

When Defendant Carney first got involved in this investigation, the rumors regarding Trooper Nelson and the dirty police already were rampant. (September 8, 2006 Tr. 161). Defendant Carney never discussed any of these rumors with the media. (September 8, 2006 Tr. 161).

D.

Alola Boseman alleges certain derogatory statements made by Defendants Carney and Jarvis

Much of the State's novel theory that Defendants had obstructed a police officer indirectly by making derogatory comments about the police rested on the testimony of Alola Boseman.

Ms. Boseman, who admitted she was a cocaine addict, testified that Mr. Lecco sometimes gave her cocaine for free. (September 8, 2006 Tr. 10). Ms. Boseman told State Trooper Akers that she had introduced Mr. Lecco to his cocaine connection in Columbus. (September 8, 2006 Tr. 32). Jean Lecco, Mr. Lecco's wife, introduced Ms. Boseman to Defendants. As noted earlier, Defendant Jarvis is a cousin of Mr. Lecco and Walt Harmon is one of her nephews. (September 8, 2006 Tr. 13).

As a result of her involvement in obtaining cocaine from Mr. Lecco, Ms. Boseman was a witness with information the State wanted in connection with the investigation of the murder of Ms. Collins. State Trooper Clifford E. Akers acknowledged that Ms. Boseman gave statements to the police on March 24, April 27, May 6, 10, 20, 26, and June 17, 2005. At no point in any of these statements did Ms. Boseman mention Defendants Carney or Jarvis. (September, 8, 2006 Tr. 68-69, 96). On August 18, 2005, after being given immunity from prosecution from the State, Ms. Boseman gave another statement and, in that statement, she again did not mention either Defendant Carney or Defendant Jarvis. (September 8, 2006 Tr. 70, 96). As part of her deal with the federal government, Ms. Boseman was placed in the witness protection program. (September 8, 2006 Tr. 27).

Ms. Boseman's name became known to Defendant Carney during interviews with other witnesses and Ms. Boseman initiated the contact by leaving a message on Defendant Carney's cell phone. (September 8, 2006 Tr. 154). Defendant Carney believes this initial call occurred on or about July 15, 2005. Prior to this call, Defendant Carney had never had any contact with Ms. Boseman and had never been to her house. (September 8, 2006 Tr. 155). To the best of her recollection, Defendant Carney only spoke to Ms. Boseman one or two times. Defendant Carney was in Kanawha County when she called Ms. Boseman. (September 8, 2006 Tr. 155).

During the telephone call, Defendant Carney could hear a voice in the background, which sounded like Ms. Boseman was being coached in what to say. (September 8, 2006 Tr. 156). Ms. Boseman called Defendant Carney and told her she was afraid because someone had shot at her door. (September 8, 2006 Tr. 156). When Defendant Carney told Ms. Boseman that there was a rumor going around that Trooper Nelson had a sexual relationship with Carla Collins, Ms. Boseman stated that she had heard the same thing. (September 8, 2006 Tr. 157). Defendant Carney also told Ms. Boseman that other witnesses had told her that some of the police were dirty, and Ms. Boseman agreed that some of the police were corrupt. (September 8, 2006 Tr. 157). Defendant Carney denies ever telling Ms. Boseman that the police would kill Ms. Boseman if she did not talk to Defendant Carney. (September 8, 2006 Tr. 157).

Defendant Carney did express concern for Ms. Boseman's safety and told her to call the federal authorities. (September 8, 2006 Tr. 158). Defendant Carney believed Ms. Boseman's life was in danger because she was involved in the drug trade in Mingo County. (September 8, 2006 Tr. 158). Defendant Carney gave Ms. Boseman the name of an F.B.I. agent named Matt Hoke. (September 8, 2006 tr. 159). Some time later, Ms. Boseman called Defendant Carney and said it was urgent that she come to Mingo County, but Defendant Carney declined to do so. (September 8, 2006 Tr. 160).

Ms. Boseman's version of the critical July 15, 2005 telephone conversation with Defendant Carney was very similar to Defendant Carney's own testimony. On or about July 14, 2005, Trooper Akers asked Ms. Boseman to return a call to Defendant Carney, which call was returned on July 15, 2005. (September 8, 2006 Tr. 69). The only documentation of any involvement by Defendant Carney is his note regarding the conversation he had with Ms. Boseman on July 15, 2005. (September

8, 2006 Tr. 73). Trooper Akers confirmed that Ms. Boseman told him that Defendant Carney never asked her not to talk to the police. (September 8, 2006 Tr. 74).

The conversations Ms. Boseman had with Defendants Carney and Jarvis occurred in Mingo County, but Defendants Carney and Jarvis were never present in Ms. Boseman's house. (September 8, 2006 Tr. 100-01). During the July 15, 2005 telephone conversation with Defendant Carney, Ms. Boseman alleged that Defendant Carney made a number of statements regarding the police investigating the murder of Ms. Collins. Repeatedly during this conversation, Defendant Carney advised Ms. Boseman her telephone was tapped and the police were listening to her calls. (September 8, 2006 Tr. 40).

According to Ms. Boseman, during this telephone call, which Defendant Carney insisted was being monitored by the police, Defendant Carney made the following allegations:

1. Ms. Boseman might be killed by the police if she did not provide Defendant Carney with some information;

2. Troopers Nelson, Perdue, and Akers had been sexually intimate with Ms. Collins;

3. These same Troopers were involved in a cover-up of her murder;

4. Defendant Carney had heard that Trooper Nelson had impregnated Ms. Collins; and

5. Any information she had should be given to Defendant Carney. (September 8, 2006 Tr. 15, 16, 38).

Defendant Carney explained her involvement in uncovering evidence involving public corruption, suggested that any information regarding corruption would be presented to the proper

authorities in Washington, D.C., and Defendant Carney had an F.B.I. agent call Ms. Boseman on a later date. (September 8, 2006 Tr. 16).

During this telephone conversation, Defendant Carney never told Ms. Boseman not to talk to the police. (September 8, 2006 Tr. 44). Even after this conversation, Ms. Boseman continued fully cooperating with the police. (September 8, 2006 Tr. 45). Matt Hoke is the FBI agent who called Ms. Boseman at the request of Defendant Carney. (September 8, 2006 Tr. 50).

Ms. Boseman certainly had a right to be concerned about her own personal safety. Carla Collins, who had cooperated with the police, already had been murdered by the time Ms. Boseman started talking to law enforcement. Furthermore, during this same time period, Ms. Boseman's house was shot up and her back door was stabbed with knives by unknown persons. (September 8, 2006 Tr. 17-18). Ms. Boseman freely acknowledged she was scared, based upon the shooting into her house, people hanging up on telephone calls, and men looking in her windows. She also was scared of the police officers in this investigation because she knew Ms. Collins was working with them and she ended up dead. (September 8, 2006 Tr. 20).

Ms. Boseman also claimed to have had a conversation with Defendant Jarvis, in which she stated Trooper Nelson had had sex with Ms. Collins and for that reason, the police were involved in covering up some of the facts in this case. Ms. Boseman further alleged that Defendant Jarvis told her she had taken another witness, Carmella Blankenship, to her own home to protect her from the police. (September 8, 2006 Tr. 19). Defendant Jarvis offered to allow Ms. Boseman to stay with her, but Ms. Boseman did not act on that offer. (September 8, 2006 Tr. 24). This conversation occurred after Ms. Boseman already had been granted immunity. (September 8, 2006 Tr. 51).

Ms. Boseman did conclude that the concern for her safety expressed by Defendants Carney and Jarvis appeared to be genuine. "They offered to protect me, so they must really believe--Ms. Jarvis and Ms. Carney offered to give me protection. They must have thought the police were covering up something." (September 8, 2006 Tr. 40).

State Trooper David M. Nelson testified that these derogatory allegations about the police hindered the investigation because the police would have to convince the witnesses to trust the police again. (September 7, 2006 Tr. 15).

State Trooper Akers claimed that his most frustrating day as an investigator occurred when a witness named Carmella Blankenship was supposed to show the police where some evidence was, but just prior to the meeting with her, Defendants Carney and Jarvis had taken her to Charleston. (September 8, 2006 Tr. 82). He did acknowledge that the location of Ms. Blankenship was provided to the police, that she cooperated with the police, was given immunity, and testified before the grand jury. (September 8, 2006 Tr. 83-84). The State did not call Ms. Blankenship as a witness in this trial because, according to the State, the United States Attorney's office had asked the State not to call her as a witness. (September 8, 2006 Tr. 137).

Defendant Carney had never told any witness not to cooperate with the police. (September 8, 2006 Tr. 174). Defendant Carney and a person named Judy Harmon, who had been a counselor to Carmella Blankenship when Ms. Blankenship was in school, approached Ms. Blankenship when she was sitting on her porch on the day Ms. Blankenship had just testified before the grand jury. (September 8, 2006 Tr. 174). Ms. Blankenship was visibly upset and crying. She asked Defendant Carney and Ms. Harmon if they could take her some place, so, after checking with Mr. Clifford, they took her to a motel in Williamson. (September 8, 2006 Tr. 177). Mr. Clifford came to Williamson

later that night and put Ms. Blankenship, her husband, and daughter in a motel room. The next day, Ms. Blankenship was brought to Charleston. Mr. Clifford informed federal authorities of Ms. Blankenship's whereabouts that same day. (September 8, 2006 Tr. 178). Defendant Carney denied ever intentionally obstructing the investigation and, in fact, even at the time of the trial, Defendant Carney continued to cooperate and assist the police in connection with this investigation. (September 8, 2006 Tr. 179).

Defendant Jarvis was born in Newton, Mingo County. (September 8, 2006 Tr. 200). Defendant Jarvis recalls receiving a telephone call from Ms. Boseman, during which she stated that she was afraid and needed help. (September 8, 2006 Tr. 202). Defendant Jarvis denies ever telling Ms. Boseman that if she did not talk to Defendant Jarvis, the police would kill her and further denied ever telling Ms. Boseman that the police were involved in the murder of Carla Collins or in covering up the murder. (September 8, 2006 Tr. 203). Defendant Jarvis did tell Ms. Boseman that the police were involved in the drug business in the area, based upon rumors she had heard and the fact that Porgie Lecco had been selling drugs for about twenty years. (September 8, 2006 Tr. 204).

Defendant Jarvis has never been inside Ms. Boseman's house. (September 8, 2006 Tr. 204-05). Defendant Jarvis did knock on the door of Ms. Boseman's house once, but Ms. Boseman was not home. (September 8, 2006 Tr. 205). Ms. Boseman did come to Charleston on one occasion and asked Defendant Jarvis if Defendant Jarvis could visit Mr. Lecco with her. (September 8, 2006 Tr. 206). Ms. Boseman, Jessica (Ms. Boseman's daughter), Defendant Jarvis, and Beth (Defendant Jarvis's daughter) met at the Taste of Asia restaurant in South Charleston. (September 8, 2006 Tr. 207). After Ms. Boseman explained how terrified she was, Defendant Jarvis recommended that Ms. Boseman speak to someone at the F.B.I. (September 8, 2006 Tr. 207-08). Defendant Jarvis and

Defendant Carney were never in Mingo County together talking to or meeting with Ms. Boseman. (September 8, 2006 Tr. 209).

Defendant Jarvis had heard the rumors about police officers having sexual relations with Carla Collins and had heard that Ms. Collins had made such a statement, but Defendant Jarvis denies ever telling anyone those rumors were true. (September 8, 2006 Tr. 217).

E.

Defendants involvement in a brief inspection of a house owned by Charles Burton and with Mr. Burton's consent and presence

Patricia Jablensky,[5] who originally was charged with obstructing a police officer with Defendants Carney and Jarvis, was given immunity to testify in this trial. (September 7, 2006 Tr. 138). On July 18, 2005, Defendant Jarvis stopped by Ms. Jablensky's house and asked if she knew where Charlie Burton lived. Ms. Jablensky offered to go with them to see Mr. Burton. (September 7, 2006 Tr. 30, 133). Mr. Burton owned a house previously rented to Valerie Friend, who was one of the individuals charged in connection with the murder of Ms. Collins and at that time was in jail, and had offered to rent or sell the house to Ms. Jablensky. (September 7, 2006 Tr. 104, 139).

A group consisting of Defendants Carney and Jarvis, Mr. Burton, Ms. Jablensky, and a man named Bo[6] went to the house owned by Mr. Burton in Matewan. Ms. Jablensky, Defendant Jarvis, and Mr. Burton got out of the car and Mr. Burton tried his key on the front door. However, Mr. Burton said the lock apparently had been broken, so he opened a window and entered his house

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[5]In the trial transcript, Ms. Jablensky sometimes is referred to as "Patricia Hammonds" or "Trish Hammonds." To avoid any confusion, she will be referred to as Ms. Jablensky throughout this **APPEAL BRIEF**.

[6]The trial transcript states refers to this other person as "Bo," but the record otherwise reflects that Ms. Boseman was referring to Wetzel Bowe, who is an investigator.

through that window. (September 7, 2006 Tr. 134). Mr. Burton told the group that the front door was broken because someone had come to the house the day before and removed Ms. Friend's belongings. Defendant Carney remained sitting in the car. (September 7, 2006 Tr. 135).

State Trooper Nelson acknowledged hearing that other people had entered Ms. Friend's residence prior to this brief inspection in July, 2005. However, other than an interview with John Davis, State Trooper Nelson had no actual knowledge that the State had interviewed any of these other people, who had removed things from this house owned by Mr. Burton. (September 7, 2006 Tr. 42-43). State Trooper Anthony S. Perdue admitted that Ms. Jablensky had given the police information that other people had been in this house prior to this visit and may have removed a truck load of stuff. (September 7, 2006 Tr. 106).[7]

There was no police tape at the house and Mr. Burton had not indicated that the police had ever been there. (September 7, 2006 Tr. 141). Ms. Jablensky testified that they all believed the house was vacant. (September 7, 2006 Tr. 139). Defendant Jarvis, Ms. Jablenksy, and Mr. Burton entered the house and generally looked around. They did not stay very long because the house was very messy, full of trash and maggots. (September 7, 2006 Tr. 142). The only things left in the house appeared to be trash. (September 7, 2006 Tr. 147). Defendant Jarvis removed a Bible, two pieces of paper off that had been printed off the internet, two cameras, and two film canisters. (September 7, 2006 Tr. 136).

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[7]Unlike Defendants, who not only gave the police a full accounting of any item removed from this house, but also provided all such items to the police, there is nothing in the record identifying what items were removed from this house by these other people. Furthermore, unlike Defendants, these other people were never charged with obstructing a police officer or any other crime in connection with the removal of items from this house.

State Trooper Nelson explained that the items removed from this house were provided to the United States Attorney's office by Mr. Clifford. (September 7, 2006 Tr. 18, 57). The State was interested in obtaining any photographs because the State had information that some photographs had been taken of Ms. Collins just hours prior to the murder. However, the film recovered that had been taken from this house was blank. (September 7, 2006 Tr. 19). State Trooper Nelson admitted that the materials removed from the house had no significance to the murder of Ms. Collins, but speculated that the things that were missing, such as the film, is what concerned the State. (September 7, 2006 Tr. 20). State Trooper Perdue stated there was no evidence that Defendants Carney or Jarvis tampered in any way with the evidence returned in the box. (September 7, 2006 Tr. 108). The State had never searched this house because there was no probable cause to serve as the basis for a search warrant. (September 7, 2006 Tr. 21).

State Trooper Perdue testified that the stuff removed from the house had no value to the investigation. He also explained that he would have liked to search this house, but there was no basis for a search warrant. (September 7, 2006 Tr. 103).

State Trooper John C. Dotson examined the box, which contained the stuff removed from the house. (September 7, 2006 Tr. 117). Included were two cameras, with no film in them, and two envelopes from a film developing store. (September 7, 2006 Tr. 120, 125). The envelope from the film developing company, which was empty and contained no photographs, had marked on the outside a charge of zero. (September 7, 2006 Tr. 128).

Defendant Carney explained that Mr. Clifford had requested Defendant Carney, Defendant Jarvis and another investigator named Wetzel Bowe go to Mingo County on or about July 18, 2005. (September 8, 2006 Tr. 162). Defendant Carney was a passenger in the car. The main purpose of that trip was to return a deed to Charles Burton, who earlier had given that deed to Mr. Clifford to review in an effort possibly to retain Mr. Clifford to represent Mr. Burton's wife. Mr.

Burton subsequently called and said he wanted to retain a lawyer named Butch West and asked for the deed to be returned. Defendant Jarvis, who is a realtor and an aunt of Walter Harmon, went with them because she grew up in Mingo County. (September 8, 2006 Tr. 163).

After Defendant Jarvis returned the deed to Mr. Burton, Mr. Burton and Ms. Jablensky asked for a ride to the house because Ms. Jablensky was considering renting it. (September 8, 2006 Tr. 165). When they arrived at the house, there were no police present, no police tape, no indication that the police had ever been there, and no trespassing signs. (September 8, 2006 Tr. 166). Wetzel Bowe and Defendant Carney waited in the car while Mr. Burton, Ms. Jablensky, and Defendant Jarvis went on the porch.

When the door would not open, Mr. Burton went into the house through a window. (September 8, 2006 Tr. 166). When Defendant Jarvis returned to the car, she had a book and a bag, which were place in the trunk. (September 8, 2006 Tr. 167). When they returned to Charleston, after looking at the contents, everything was given to Mr. Clifford for him to give the items to the proper authorities. (September 8, 2006 Tr. 168). Defendant Jarvis took the two cameras to Drug Emporium to have the film developed. (September 8, 2006 Tr. 170). The envelopes from Drug Emporium, for which there was no charge, were never opened. (September 8, 2006 Tr. 170). Defendant Carney testified that neither the paper with directions on it nor the letter entered as State's Exhibit 2 were in the box of materials she sealed in a box for Mr. Clifford to give to the appropriate authority. (September 8, 2006 Tr. 172).

The only time Defendant Carney and Defendant Jarvis were together in Mingo County was when they went to Mr. Burton's house. (September 8, 2006 Tr. 209). Mr. Burton was wanting to rent the house to Ms. Jablensky. (September 8, Tr. 209). The house was in bad condition, with trash, insects, dried food, holes, and junk everywhere. (September 8, 2006 Tr. 210).

Inside the house, Defendant Jarvis noticed a Bible with some writing in it, as well as some pages on witchcraft on a dresser. She picked up the Bible with the witchcraft pages as well. (September 8, 2006 Tr. 211). Mr. Burton explained to them that Daddy Rat and Harold Scales had come with a man named Jim Nichols and hauled most of Valerie Friend's stuff out of the house. (September 8, 2006 Tr. 213). Defendant Jarvis explains that no film was developed and that is why there was no charge. (September 8, 2006 Tr. 229).

III.

Issue presented

Whether the evidence is sufficient to sustain Defendants' convictions for obstructing a police officer and conspiracy to obstruct a police officer where Defendants took no direct forcible or illegal action against a police officer?

IV.

Argument

The evidence is insufficient to sustain Defendants' convictions for obstructing a police officer and conspiracy to obstruct a police officer because Defendants took no direct forcible or illegal action against a police officer.

A.

Standard of review

Defendants' main contention is that the facts in this case, as a matter of law, are insufficient to support their convictions for obstructing a police officer and conspiracy to obstruct a police officer. The standard of review for addressing the sufficiency of the evidence in a criminal case was summarized by this Court in Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995):

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

In *State v. Srnsky*, 213 W.Va. 412, 417, 582 S.E.2d 859, 864 (2003), this Court further noted, in analyzing an obstructing the police conviction:

> It is a fundamental principle "[i]n a criminal prosecution, [that] the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged...." Syl. Pt. 4, in part, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled in part on other grounds, Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 241 S.E.2d 914 (1978).

B.

Conviction under W.Va.Code §61-5-17(a), requires the State to prove defendant committed forcible or illegal actions

West Virginia Code §61-5-17(a), provides:

> Any person who by threats, menaces, acts or otherwise, **forcibly or illegally** hinders or obstructs, or attempts to hinder or obstruct, any law enforcement officer, probation officer or parole officer acting in his or her official capacity is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars or confined in the county or regional jail not more than one year, or both.[8] (Emphasis added).

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[8]The indictments against these Defendants specifically alleged:

> [O]n or about July 2005, in Mingo County, West Virginia, and within one (1) year of the return of this indictment, did **unlawfully**, knowingly, intentionally, **illegally**, but not feloniously, hinder, disrupt and attempt to hinder and disrupt law enforcement officers, namely First Sergeant D. M. Nelson, Trooper First Class A. S. Perdue and First Lieutenant C. E. Akers, acting in an official capacity by taking

While W.Va.Code §61-5-17(a), is quite broad and potentially can be violated through "menaces, acts or otherwise," it is **mandatory** that such menaces, acts, or otherwise be committed either "forcibly or illegally." In reviewing the obstructing a police officer statutes quoted either in cases from other jurisdictions or in legal treatises, this requirement that a defendant either must use force or commit an illegal act distinguishes W.Va.Code §61-5-17(a), from many of the obstructing a police officer statutes in other states. As a result of this critical difference between W.Va.Code §61-5-17(a), and the analogous statutes in other states, decisions from other jurisdictions that necessarily are based upon the language of their own statute have very little application to the present case.

In *State v. Johnson*, 134 W.Va. 357, 360, 59 S.E.2d 485, 487 (1950), this Court elaborated on what the phrase "forcibly or illegally" as used in this statute means:

> The words "forcibly or illegally" used in the statute clearly mean any unlawful interference with the officer in the discharge of his official duties, whether or not force actually is present.

In all of the decisions issued by this Court examining a conviction under W.Va.Code §61-5-17, the defendant took some direct action that either involved force or otherwise was unlawful, against a specific police officer who was present at the time such forcible or illegal action was taken. *State v. Srnsky*, 213 W.Va. 412, 582 S.E.2d 859 (2003)(Failing to identify onself to a police officer does not violate W.Va.Code §61-5-17(a), unless a specific statute requires such disclosure or the officer explains why the person's identity is being sought);*State v. Martisko*, 211 W.Va. 387, 566

> and concealing evidentiary items, making defamatory accusations against law enforcement officers and otherwise interfering with the Carla Collins murder investigation, against the peace and dignity of the State of West Virginia and in violation of West Virginia Code § 61-5-17(a). (Emphasis added).

S.E.2d 274 (2002)(Defendant convicted of obstructing a police officer where he physically resisted during the arrest and caused one officer to fall down a flight of stairs); *State v. Phillips*, 205 W.Va. 673, 520 S.E.2d 670 (1999)(Affirmed conviction of obstructing a police officer where the defendant took forcible and direct actions against a police officer, who was working as a security guard at the time); *State v. Snider*, 196 W.Va. 513, 474 S.E.2d 180 (1996)(Obstructing a police officer conviction upheld where the defendant physically attacked and resisted a police officer); *State v. Davis*, 199 W.Va. 84, 483 S.E.2d 84 (1996)(Obstruction of a police officer conviction upheld where intoxicated defendant in a house where a gun had been fired noted that the gun was still loaded and used threatening language indicating he may use the gun); *State v. Forsythe*, 194 W.Va. 496, 460 S.E.2d 742 (1995)(Defendant's conviction for obstructing a police officer affirmed based upon defendant's physical struggle with officer while being arrested); *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988)(Obstructing a police officer conviction set aside where defendant asked officer to conduct arrest of a traffic offender outside of defendant's shopping mall property); *State v. Jarvis*, 172 W.Va. 706, 310 S.E.2d 467 (1983)(Defendant guilty of obstructing a police officer where he was stopped while driving his car, told that he was under arrested, and then defendant drove away from the police); *State v. Holdren*, 170 W.Va. 355, 294 S.E.2d 159 (1982)(Conviction for obstructing a police officer upheld where the defendant, who was intoxicated, demanded that the police, who were investigating a separate disturbance in a restaurant, investigate a crime committed against him, the defendant became loud and abusive, refused to leave when asked, created a danger of a fight, spit on the patrol car, and physically hit a police officer).

This Court has never affirmed a conviction under this statute where the defendant is accused of taking some forcible or illegal action against another person, who is not a police officer,

which action somehow resulted in some unknown police officer, who was not present at the time, being obstructed or hindered in the lawful exercise of his official duties. Furthermore, Defendants have not found any case from any other jurisdiction where a defendant was convicted of obstructing a police officer in such an indirect fashion. In a very comprehensive Annotation entitled "What constitutes obstructing or resisting officer, in absence of actual force," 66 A.L.R.5th 397 (1999), there is no reference to any decision that could be deemed even remotely similar to the facts in this case. In a definitive law review article relied upon by the United States Supreme Court in *City of Houston v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), which is discussed below, the author identified the various types of activities covered by obstructing a police officer statutes. Note, "Types of Activity Encompassed by the Offense of Obstructing a Public Officer," 108 U.Pa.L.Rev. 380 (1960). Nothing in this article provides any support for the State's convictions in the present case.

This Court has noted that not every minor irritant or inconvenience endured by the police can be converted into a criminal act. For example, in *Jarvis*, 172 W.Va. at 709, 310 S.E.2d at 470, where the question was whether flight from the police, after the defendant had been told he was under arrest, violated W.Va.Code §61-5-17, the Court noted that not every hindrance suffered by the police would be a crime:

> We recognize, however, that if his flight had not been illegal, there would not have been a violation of the statute. The statute only reaches conduct that unlawfully hinders, obstructs or opposes an officer in the lawful exercise of his official duty. Courts in applying similar statutes have recognized that a person does not violate the law by doing what he has a lawful right to do, regardless of whether it obstructs or hinders a police officer.

Thus, if the defendant is engaged in **legal** activity, that defendant cannot be found guilty of obstructing a police officer. The only decision by this Court where the defendant's actions were

found not to be forcible or illegal and, therefore, not a violation of W.Va.Code §61-5-17, is *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988). In *Wilmoth*, the defendant owned the Parkersburg Mall and became upset when a police officer pulled over a traffic offender on to the parking lot of the mall. The defendant was concerned about the traffic congestion caused by this traffic stop and asked the police officer to leave the property. This defendant was convicted of obstructing a police officer in magistrate court, based upon these actions, and filed a petition for a writ of prohibition to stop the trial in circuit court.

In prohibiting the scheduled circuit court trial, this Court held in the Syllabus of *State ex rel. Wilmoth v. Gustke*, 179 W.Va. 771, 373 S.E.2d 484 (1988):

> A person upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate *W.Va.Code*, 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech. *U.S.Const.* amend. I; *W.Va.Const.* art. III, §7.

Since constitutionally protected activity is, by definition, **legal** activity, such activity cannot be the basis for an obstructing a police officer charge. Throughout this trial, Defendants made the argument that their actions were constitutionally protected and, therefore, could not be the basis for a criminal conviction.

Wilmoth was based, in large part, on the United States Supreme Court's decision in *City of Houston*, where the First Amendment rights of all citizens to question the police, in an appropriate manner, was upheld. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." 482 U.S. at 462-63, 107 S.Ct. at 2510, 96 L.Ed.2d at 412-13.

The critical question raised in this case is whether Defendants committed any forcible or illegal acts against a police officer, which hindered or obstructed the officer from carrying out his lawful duties. To answer this question, Defendants will review the State's evidence.

1.

Derogatory remarks about police officers

Although Defendants denied making some of the statements attributed to them by Ms. Boseman, for purposes of this argument, the Court is required to believe every word uttered by Ms. Boseman is true. Ms. Boseman claimed Defendant Carney told Ms. Boseman she might be killed by the police if she did not provide information to Defendant Carney, that Troopers Nelson, Perdue, and Akers had been sexually intimate with Ms. Collins, that these same Troopers were involved in a cover-up of her murder, that Defendant Carney had heard that Trooper Nelson had impregnated Ms. Collins, and that any information she had should be given to Defendant Carney. (September 8, 2006 Tr. 15, 16, 38). Ms. Boseman also claimed to have had a conversation with Defendant Jarvis, in which she stated Trooper Nelson had had sex with Ms. Collins and for that reason, the police were involved in covering up some of the facts in this case. Ms. Boseman further alleged that Defendant Jarvis told her she had taken another witness, Carmella Blankenship, to her own home to protect her from the police. (September 8, 2006 Tr. 19). Defendant Jarvis offered to allow Ms. Boseman to stay with her, but Ms. Boseman did not act on that offer. (September 8, 2006 Tr. 24).

Ignoring for the moment that these alleged statements were made to a person other than a police officer, in this appeal, the Court must decide, was it **unlawful** for Defendants to make these statements to this particular witness? The State did not provide any instruction explaining what criminal statute was violated by Defendants when they allegedly made these statements.

In its ruling on the record denying Defendants' motion for judgment of acquittal, the trial court accurately summarized what statements the jury may believe were made by Defendants. (September 8, 2006 Tr. 131-32). While acknowledging the First Amendment implications of these statements, the trial court ultimately concluded the jury may find that the statements summarized above actually were made by Defendants. Significantly, what the trial court completely failed to address is how these statements either were made forcibly or unlawfully and how such statements, made to someone other than a police officer, could ever be sufficient to support a criminal conviction for obstructing a police officer.

Of course, the reason the State and the trial court failed to analyze the unlawfulness of any statements attributed to Defendants simply is because all of the statements are protected by the First Amendment. To rule otherwise would be contrary to the holdings in *Wilmoth* and *Hill*, which hold that constitutionally protected speech cannot be criminalized. Unfortunately, because the State spent so much of this trial developing evidence on what these Defendants told various witnesses, it is very likely the jury convicted Defendants based upon constitutionally protected speech.

The State may argue that Defendants' exercise of their First Amendment rights "hindered" the investigation because the police officers had to win back the trust of the witness. However, as this Court observed in *Jarvis*, 172 W.Va. at 709, 310 S.E.2d at 470, "a person does not violate the law by doing what he has a lawful right to do, regardless of whether it obstructs or hinders a police officer."

Defendants' involvement in Mingo County was triggered by the arrest of Walter Harmon, who hired Mr. Clifford to be his defense counsel. Mr. Clifford asked his employee, Defendant Carney, to conduct an investigation has part of the defense provided to Mr. Harmon. Defendant Jarvis became involved in this investigation due to her family relationship with Mr.

Harmon. Once Defendants arrived in Mingo County, the rumors regarding police misconduct already were being discussed throughout the community. Defendants had every right and some would assert an obligation to explore the accuracy of these rumors in talking to various witnesses.

Clearly, these statements allegedly made to various witnesses cannot be criminalized merely because the police later claim to have been inconvenienced by having to win back the trust of certain witnesses. Any other ruling necessarily would chill an investigator's First Amendment right to speak to witnesses as well as a criminal defendant's Sixth Amendment right to obtain evidence in his favor. From a practical standpoint, if investigators can be subjected to this type of criminal prosecution, criminal defense lawyers and their investigators might have to submit questions to the police for preapproval before speaking to witnesses to make sure such questions do not otherwise hinder the underlying investigation.

2.

Providing temporary shelter to a witness outside of Mingo County

The State, through the testimony of Trooper Akers, complained about Defendants providing temporary shelter and safety to a witness named Carmella Blankenship, who was supposed to show the police where some evidence was. (September 8, 2006 Tr. 82). Although Ms. Blankenship ultimately cooperated with the police a few days later, the State nevertheless cites this incident as "hindering" the investigation.

In addressing Defendants' motion for judgment of acquittal, the trial court mentioned the testimony of Trooper Akers in passing and noted that Trooper Akers claimed he had been hindered when his interview with Carmella Blankenship was delayed because she left Mingo County in fear of her life. Again, in summarizing these facts, while the trial court explained the jury may conclude Trooper Akers was "hindered" by Defendants coming to the aid of Ms. Blankenship, the trial court

failed to address how such actions either were forcible or unlawful or how such actions could be sufficient to uphold a conviction for obstructing a police officer when a police officer was not present at the time. (September 8, 2006 Tr. 132-33).

Once again, this Court must decide whether it was **unlawful** for Defendants, who, after meeting with a very upset and scared Ms. Blankenship, offered to provide her shelter outside of Mingo County, which caused her to miss a meeting with the police scheduled the next day? The State did not present any evidence that these Defendants deliberately took Ms. Blankenship and her family to Kanawha County with the express purpose of preventing her from meeting with the police. While the police no doubt were inconvenienced and perturbed that Ms. Blankenship went to Charleston with Defendants because she feared for her life, clearly Defendants' caring actions in helping Ms. Blankenship is not, in itself, a criminal act.

The State's theory, if accepted, could criminalize a wide variety of otherwise innocent actions. What if someone negligently drove a car, collided with Ms. Blankenship the day before this meeting scheduled with Trooper Akers, and as a result of the injuries suffered, Ms. Blankenship was unable to make it to the meeting? No doubt Trooper Akers could still claim that he was hindered and inconvenienced because Ms. Blankenship was not available for their scheduled meeting the next day. It is the "unlawful" element required under W.Va.Code §61-5-17, that distinguishes the innocent acts committed either by these Defendants or, in the hypothetical, by the negligent driver, from the criminal acts required under the statute.

3.

Consented to search of a house with the house's owner present

The final acts relied upon by the State relate to the "search" of the house owned by Charles Burton. It is not disputed that the house in question was owned by Mr. Burton, Mr. Burton

was present during the search, Mr. Burton crawled through a window and allowed Defendant Jarvis and others to enter the house through the front door, Mr. Burton's house had not be the scene of any crime, Mr. Burton's house was not marked off by any police tape, the police had never searched Mr. Burton's house, the police never had probable cause to obtain a search warrant for Mr. Burton's house, and the few items removed from Mr. Burton's house were provided to law enforcement a few days later by Mr. Clifford.

In denying Defendants' motion for judgment of acquittal, the trial court paid particular attention to the potential evidentiary value of the materials removed from Mr. Burton's house, which were turned over to law enforcement, rather than addressing the unlawfulness of Defendants' actions. (September 8, 2006 Tr. 130-31). The trial court focused on Trooper Nelson's testimony that included in the materials turned over to law enforcement was a piece of paper with directions that could have been used to find the shovel. Defendant Carney specifically disputed that this paper was included in the box provided to the United States Attorney's office. Even accepting Trooper Nelson's version of the facts, once again the trial court failed to address how these actions attributed to these two Defendants either were unlawful or somehow obstructed a police officer acting in his official capacity. Keep in mind there was no police officer present at Mr. Burton's house and it is undisputed that the State never had probable cause to search Mr. Burton's house.

How can a consented to search of a house, with the owner of the house present, be **unlawful**? Once again, the obvious answer is there was nothing unlawful about this search. As for the few items removed from this house, the evidence is undisputed that they were provided to law enforcement shortly thereafter. While the State has engaged in gross speculation about the film canisters, there is no actual evidence either that this film was in the house at the time of this search nor is there any evidence that these Defendants destroyed anything taken from this house.

Defendants respectfully submit that their convictions must be set aside because the State failed to prove all elements of the crimes alleged. Specifically, the State failed to prove that Defendants took any "illegal" action that hindered or obstructed a police officer. Without proof of this essential element, the evidence is insufficient as a matter of law to sustain these convictions.

V.

Conclusion

Defendants Wanda Carney and Betty Jarvis are not timid wallflowers who are afraid to get involved in controversy. Defendant Carney, as head of an organization called West Virginia Wants to Know, has ruffled a few feathers throughout this State as that organization sought to ferret out what it deemed to be wasteful public spending and public corruption. Defendant Jarvis, who is a retired public school teacher, also served on the Kanawha County Board of Education and in her capacity as a Board member was featured in a wide variety of controversies that became the subject of much media attention. Throughout their careers, Defendants have attempted to exercise their First Amendment rights in an appropriate and responsible way and, whether everyone agreed with them or not, have tried to improve government and benefit society through their actions.

For Defendants now to be condemned as convicted criminals for exercising their First Amendment rights and for assisting persons charged with crimes, who have a Sixth Amendment right to obtain evidence in their favor, is outrageous and a gross violation of these most cherished constitutional rights. Simply put, the State failed to prove that these Defendants committed any forcible of illegal acts that somehow could be construed as constituting a hindrance or obstruction to a police officer engaged in the exercise of his official duties.

For the foregoing reasons, Defendants Wanda Carney and Betty Jarvis respectfully move this Court to schedule this case on the argument docket and to reverse the final order of the

Circuit Court of Mingo County and to set aside Defendants' convictions as a matter of law. Furthermore, Defendants seek such other relief as this Court deems appropriate.

WANDA CARNEY and **BETTY JARVIS**, Defendants,

–By Counsel–

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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **DEFENDANTS' JOINT PETITION FOR APPEAL** was served on counsel of record on the 13th day of November, 2007, through the United States Postal Service, postage prepaid, to the following:

C. Michael Sparks
Prosecuting Attorney
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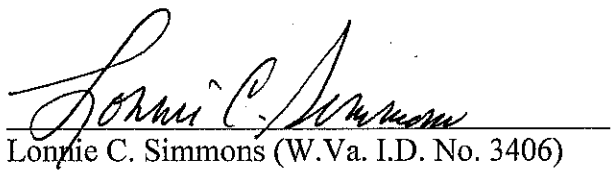

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